No. 85-1914

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

LYNDON H. LAROUCHE, JR.,

Petitioner,

—v.—

NATIONAL BROADCASTING COMPANY, INC., *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF RESPONDENTS NATIONAL BROADCASTING COMPANY, INC., LYNCH, NYKANEN, AND ROSS IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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June 21, 1986

QUESTIONS PRESENTED

1. Whether this Court should review discovery rulings of the United States District Court for the Eastern District of Virginia rooted in plaintiff's demonstrated failure to exhaust alternative sources of information and plaintiff's proven pattern of harassment, which were affirmed by the United States Court of Appeals for the Fourth Circuit, and which had no impact on the result of the action?

2. Whether this Court should review an interpretation of Virginia law by the District Court, which was affirmed by the Court of Appeals?

3. Whether this Court should review the District Court's refusal to declare a mistrial, which was affirmed by the Court of Appeals?

PARTIES BELOW

The parties to the proceedings below were Lyndon H. LaRouche, Jr., plaintiff and counterclaim defendant, and National Broadcasting Company, Inc., Pat Lynch, Mark Nykanen, Brian Ross, Anti-Defamation League of B'nai B'rith, and Irwin Suall.[1]

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1 National Broadcasting Company, Inc., which was the sole counterclaim plaintiff, advises the Court pursuant to Supreme Court Rule 28.1 that while, prior to June 9, 1986, it was a wholly owned subsidiary of RCA Corporation, both RCA Corporation and National Broadcasting Company, Inc. are now wholly owned by General Electric Company.

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STATEMENT OF THE CASE

On January 30, 1984, and on March 4, 1984 National Broadcasting Company, Inc. ("NBC") broadcast two news stories about Mr. LaRouche, one on Nightly News and one on a program called First Camera. Mr. LaRouche sued for libel. On April 3, 1984, in its answer NBC asserted a counterclaim against LaRouche based on an attempted cancellation of an interview with United States Senator Daniel Patrick Moynihan by an impostor claiming to be from NBC and a similar telephone call to NBC from an impostor claiming to be an aide to Senator Moynihan. After a nine-day trial, the jury concluded that LaRouche had failed to demonstrate that the NBC broadcasts were false. The jury rejected NBC's claim under the

Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et seq.* (1982 & Supp. II 1984), as amended, but ruled in NBC's favor on its claim of interference with advantageous business relationships under the common law of Virginia. An award of $202,000 to NBC, after remittitur, was entered by the Court.

LaRouche moved for judgment *n.o.v.* on NBC's counterclaim against him, which was denied. He then appealed to the United States Court of Appeals for the Fourth Circuit. The Court of Appeals unanimously rejected LaRouche's claims of error in the District Court's discovery rulings, evidentiary rulings, interpretation of Virginia state law and refusal to declare a mistrial. A petition for *en banc* consideration was denied.

STATEMENT OF FACTS

The Broadcasts

In the two broadcasts about LaRouche, NBC reported his view that the Queen of England is a dope dealer (JA 62); his assertion that he was targeted for assassination along with President Reagan and Pope John Paul II (JA 62); his continuing efforts to intimidate reporters (JA 57, 62, 64); his violation of rules of the Federal Election Commission (JA 65); and his belief that NBC works with the "drug lobby" and is supported by the KGB. (JA 68) The second NBC broadcast also included statements of non-NBC employees that LaRouche believes Jews are responsible for all evils in the world (JA 65), that any serious investigation of LaRouche by the Internal Revenue Service would lead to criminal indictment and the closing down of his organization (JA 65), and that he at one time proposed the assassination of President Jimmy Carter, Zbigniew Brzezinski, Joseph Lund, Paul Warnecke, and David Rockefeller.[2] (JA 66)

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2 The following abbreviations will be used in this brief: "Pet'n" for citation to the Petition for a Writ of Certiorari, "Pet'n App." for

Pre-Trial Proceedings

Brian Ross, an NBC correspondent, and Ira Silverman, an NBC producer, prepared the January 30, 1984 Nightly News broadcast complained about. (Ross Tr., V, 858, 863-64) Because LaRouche now complains about issues that are relevant only to the later First Camera broadcast, no further discussion of the Nightly News broadcast is included here.

On February 10, 1984, LaRouche filed his first complaint in this action. (JA 2) In addition to NBC and Mr. Ross, the complaint named Pat Lynch as a defendant, even though Ms. Lynch was the producer of First Camera, a program that was not to be broadcast until March 4, 1984. (JA 21, 29) On February 16, 1984, LaRouche served and filed 80 requests for admission, 17 interrogatories, and 36 document requests, directed primarily to the as yet unaired First Camera broadcast. (JA 2; *see* JA 215-318)

On March 21, LaRouche filed an amended complaint (JA 2, 38), adding as a defendant Mark Nykanen, an NBC correspondent who appeared on the March 4 First Camera broadcast, and including a cause of action for defamation based on the First Camera broadcast, as well as a cause of action for conspiracy. After moving for and obtaining a protective order from the District Court, NBC made available almost 650 documents and 170 videotapes to LaRouche for inspection and copying. (JA 363) NBC withheld under a claim of privilege

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citation to the Appendix to the Petition, "JA ____" for citation to the joint appendix below, "LaRouche Tr., III, 1252" for citation to testimony at trial not included in the Joint Appendix by the name of the witness, the trial transcript volume, and page number, and "NBC Trial Ex. 114" for citation to trial exhibits not included in the Joint Appendix.

While the references above are to the two transcripts of the broadcasts that were attached to the Amended Complaint, these transcripts were never admitted into evidence. Videotapes of the actual broadcasts have been lodged with the Court of Appeals for the Fourth Circuit. (LaRouche Trial Ex. 2; NBC Trial Ex. 114)

only two documents and four videotapes in their entirety and one page of notes. (JA 319-27)

On July 16, 1984, LaRouche filed a motion seeking to compel disclosure of confidential sources. (JA 7, 214) At the time the motion was filed, LaRouche had taken only the deposition of Brian Ross; he had not taken depositions of anyone associated with the First Camera broadcast. (JA 364) Despite the Local Rule of the Eastern District of Virginia allowing five non-party depositions, LaRouche had taken no non-party depositions. (*Id.*) Magistrate Sewell denied LaRouche's motion,[3] stating that:

> "I consider specifically the matter of exhaustion of other sources, the specificity of the need without first performing other discovery in the case. And I also consider the type and nature of the controversy based upon the history of the case, the actions of the various parties in connection with discovery thus far in the case, the depositions taken, and the various other matters which relate to the nature and type of the case that we have.
>
> "For those reasons I'm going to deny the motion to compel further production at this time without prejudice to the plaintiff to renew the motion at some later time." (JA 396-97)

LaRouche renewed his motion to compel disclosure before he had taken the deposition of Pat Lynch. (JA 408; *see* JA 410) At this time, LaRouche had taken only four non-party depositions (JA 409-10, 422-24); he had not even taken the fifth deposition allowed him during the discovery period. LaRouche had noticed the deposition of four non-NBC em-

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3 On the same day Magistrate Sewell also denied LaRouche's motion to extend the five non-party deposition limit set by the Local Rules. The Magistrate gave LaRouche two options: interviewing witnesses first and, if necessary, noticing a *de bene esse* deposition prior to trial; if, after taking five depositions, another specific deposition were needed, LaRouche could ask for it. (JA 392-94)

ployees, but made no effort to take those depositions. (JA 423-24) LaRouche never even noticed the deposition of Larry Cooper, the on-the-record source of the statements in the broadcast about the discussion by LaRouche of the proposed assassination of President Carter and others. (JA 423) The District Court denied LaRouche's motion. (JA 429)

On the day the trial began, October 22, 1984, LaRouche filed his third motion, seeking to preclude the NBC defendants from relying on confidential sources at trial. (JA 684) After argument, that motion, too, was denied. (JA 693, 727-30) Balancing the interests of LaRouche as a litigant against the interests of both NBC and the public in protecting the confidentiality of the sources, the District Court relied upon the fact, *inter alia*, that "I have no evidence before me that the plaintiff has tried to comply with [the requirement of] exhaustion." (JA 728)

The Trial

LaRouche called eight witnesses to prove that the broadcasts were false. The first two witnesses, on cross-examination, testified that they agreed with LaRouche that NBC, *The New York Times*, *The Washington Post*, Walter Mondale and Henry Kissinger were part of the "drug lobby." (Grauerholz Tr., I, 192-95; Mirak Tr., I, 240, 246, 256)

The next three witnesses, all flown in from Germany, testified that they never heard LaRouche threaten to assassinate members of the Carter Administration. (Rumpf Tr., II, 333-52; Friesecke Tr., II P.M., 21-29; Hellenbroich Tr., II P.M., 42-45) The credibility of each was put at issue on cross-examination. (*E.g.*, Rumpf Tr., II, 361-63; JA 740-47; Hellenbroich Tr., II P.M., 47) Other witnesses testified that the statements in the NBC broadcasts that LaRouche is anti-Semitic were untrue (Weber Tr., VI A.M., 958-59) and the statements that LaRouche is anti-black were untrue. (Innis, Tr. II A.M., 307-09)

The final witness on falsity was LaRouche himself. LaRouche personally testified that virtually everything reported

in the two broadcasts was false. (*E.g.*, LaRouche Tr., VI, 1010, 1020-30, 1035-37, 1067-91) He specifically denied that he had ever expressed a desire to assassinate Jimmy Carter or any member of Carter's administration. (JA 1118) Mr. LaRouche also testified that the only public figure in the United States in more danger of assassination than LaRouche is President Reagan (JA 1161), that the Bush, Kennedy, and Carter campaigns all were involved in setting him up for assassination in the 1980 presidential campaign (JA 1164, 1166, 1168), that Governor Averill Harriman, Secretary of State John Foster Dulles, Secretary of State Henry Kissinger and Secretary of State Alexander Haig were all Nazis (JA 1174-77), and that KGB officials dictated to presidential candidate Walter Mondale the foreign policy program he adopted. (JA 1200-02)

LaRouche also called Pat Lynch, the producer of the First Camera program, to testify. Ms. Lynch testified that she had begun working on the March 4, 1984 program in early December of 1983 (Lynch Tr., II P.M., 72), that she had interviewed more than 108 people on the record for the LaRouche broadcast (Lynch Tr., II P.M., 143, 158) and that she repeatedly had sought to interview LaRouche, but had been rebuffed. (*E.g.*, Lynch Tr., II P.M., 153, 155) Ms. Lynch testified for four days on how she assembled the First Camera broadcast and on what it was based. (*E.g.*, JA 865-89) Ms. Lynch was questioned extensively by LaRouche's counsel as to what she had been told by Larry Cooper, an on-the-record source for the assassination story.[4]

During Ms. Lynch's testimony, at LaRouche's request, the District Court asked the jurors whether they had read an article in *The Washington Post* that morning. (The article reported on death threats made against Ms. Lynch.) (JA 750-68) When two

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4 As LaRouche's counsel either solicited this testimony or did not object to its admission, it came in for truth and was not subject to a limiting instruction on the grounds of hearsay. *E.g.*, Fed. R. Evid. 103; 1 J. Weinstein & M. Berger, *Weinstein's Evidence* ¶ 103(02) (1985). No such instruction was, in any event, even sought.

jurors responded, the court asked them to come to the bench. One juror had seen only the headline and a second had seen only a reference to the article. Both testified that they could be fair jurors in the case. (JA 769) In denying LaRouche's motion to strike the two jurors, the court said:

> "I find the jurors I think are very candid, very forthright and indicated that they have an open mind. I think they both looked me right in the eye and told me they could decide this case on the basis of what they hear here and are not influenced by it." (JA 772)

The court then instructed the jury, as it had at the start of the trial, that they should decide the case on the basis of what they heard in the courtroom and to disregard any reports in the newspapers. (JA 773-76)

The next morning, after a sketch artist for *New Solidarity*, a LaRouche publication, appeared in the courtroom (JA 901), the jury sent the District Court a note asking whether the artist was for the plaintiff. (JA 899) At LaRouche's counsel's request, the court sent a note asking why the jury was concerned. (JA 903-04) When the jury's response included a crossed out portion that indicated that some members expressed concern for their personal safety (JA 907), the court conducted an individual *voir dire* of each juror. (JA 908-13) As a result of that *voir dire* the court excused Juror Kelly who expressed fear for her personal safety, even though she said that her fear was based solely on the testimony of the day before. (JA 909-10)[5] After the court decided to excuse Juror Kelly, he said:

> "I don't find anything on my questioning of all of the jurors that show that any others have any fear because I asked them a very direct question, no preliminaries, they just said no. I don't think there was any hesitation on the part of any of the jurors. . . . I don't find anything in

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5 Juror Fewel, an alternate who was excused before the jury began its deliberations (Tr., IX, 1825-26), said that she just did not like the idea of the artist sitting and looking at the jury and drawing. (JA 908-09)

> the record as to my view of these jurors to show anything that they have in any way been poisoned. This has been a very, very attentive jury to what is going on. It's been a very fine jury." (JA 920)

At the end of the day, when the judge denied a request that further inquiry be made of the jury to determine to what extent the subject was discussed, he noted that he had carefully observed the jury during the day and saw no evidence of fear. (JA 1038-39; see also JA 1388; JA 1585-87)

The jury returned a verdict for the defendants on LaRouche's defamation claim, concluding that the broadcasts were true. (JA 1447) The jury awarded NBC both actual ($2,000) and punitive ($3,000,000) damages on its counterclaim against LaRouche for interference with advantageous business relationships. (JA 1452) It returned a verdict for LaRouche on NBC's alternate counterclaim based on the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961, *et. seq.* (1982 & Supp. II 1984), as amended ("RICO"). (JA 1452)

Post-Trial Proceedings

LaRouche made a motion for judgment *n.o.v.* or in the alternative for a new trial on NBC's counterclaims. (JA 1469) He did not move either for a directed verdict or for judgment *n.o.v.* on his defamation claim against the NBC defendants.[6] The District Court denied LaRouche's motion for judgment *n.o.v.* on the counterclaims, but on remittitur reduced the punitive damages awarded against LaRouche to $200,000, which NBC accepted. (JA 1589, 1605)

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6 As a result, LaRouche is precluded from arguing that the evidence was insufficient to support the jury's verdict on the defamation claim. *See, e.g., Porter* v. *Eckert*, 465 F.2d 1307, 1309 (5th Cir. 1972); *Warner* v. *Kewanee Machinery & Conveyor Co.*, 411 F.2d 1060, 1063 (6th Cir. 1969), *cert. denied*, 398 U.S. 906 (1970); *United States* v. *Mountain State Fabricating Co.*, 282 F.2d 263, 265 (4th Cir. 1960); 5A J. Moore, *Moore's Federal Practice* ¶ 50.12, at 50-90 (2d ed. 1986).

SUMMARY OF ARGUMENT

In his petition for certiorari Mr. LaRouche seeks review of a number of fact-specific rulings that the District Court made well within the bounds of its discretion and that were affirmed by the Court of Appeals for the Fourth Circuit. These rulings, on motions, *inter alia*, to compel discovery and to declare a mistrial for juror exposure to publicity during a libel trial, provide no novel questions of law that merit this Court's review. Additionally, LaRouche's request that this Court review the District Court's interpretation of Virginia law, which was affirmed by the Court of Appeals, is not a proper subject for certiorari.

The decisions of the District Court and the Fourth Circuit are consistent with well-established law and present no occasion for review by this Court.

ARGUMENT

I.

THE COURT OF APPEALS' AFFIRMANCE OF THE DISTRICT COURT'S FACT-SPECIFIC DISCOVERY AND EVIDENTIARY RULINGS WAS CORRECT AND PRESENTS NO NOVEL OR IMPORTANT QUESTIONS WARRANTING THIS COURT'S REVIEW

LaRouche cannot seriously claim that the District Court's confidential source rulings interfered with his ability to meet his burden of proof on the issue of actual malice as that term has been defined in *New York Times Co.* v. *Sullivan*, 376 U.S. 254 (1964), and its progeny. The jury's verdict was based solely upon LaRouche's failure to prove that the broadcasts were false.[7] Thus, LaRouche's repeated arguments that the rulings

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7 LaRouche did not object to the charge of the court as to his burden to prove that the broadcasts about him were false. *See, e.g., Phila-*

of both courts below interfered with his ability to prove constitutional malice is a *non sequitur.* Only if both the District Court and Court of Appeals interfered with LaRouche's ability to demonstrate falsity (as they did not) and were in error (as they were not) could any claim of reversible error be entertained by this Court.[8]

LaRouche focuses on two statements made in the First Camera broadcast to illustrate the "impediment" that he suffered as a result of these rulings. The first is the statement, attributed to Larry Cooper in the broadcast, that LaRouche at one time had plotted the assassination of members of the Carter Administration. LaRouche complains that his inability to cross examine Ms. Lynch about an additional, off-the-record source for this story somehow impaired his right to a fair trial. (Pet'n at 9-10) Yet LaRouche does not explain how knowledge of a confidential secondary source could have enabled him to contradict Ms. Lynch's reliance on the disclosed primary source, Mr. Cooper. LaRouche's position is made even more untenable by his failure to depose Mr. Cooper during discovery. (JA 423) Finally, LaRouche presented four

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delphia Newspapers, Inc. v. *Hepps*, 106 S. Ct. 1558 (1986); *Buckley* v. *Littell*, 539 F.2d 882, 889-90 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977); *Falwell* v. *Penthouse International, Ltd.*, 521 F. Supp. 1204, 1208 (W.D. Va. 1981); *Sellers* v. *Time, Inc.*, 299 F. Supp. 582, 584 n.2 (E.D. Pa. 1969), *aff'd*, 423 F.2d 887 (3d Cir.), *cert. denied*, 400 U.S. 830 (1970); *Sharon* v. *Time, Inc.*, 599 F. Supp. 538, 558 (S.D.N.Y. 1984). LaRouche admitted that he is a public figure. (LaR. Br. at 29)

8 The standard of review of a decision on a motion to compel discovery is limited to whether the District Court abused its discretion. *See, e.g., Laborers' International Union* v. *United States Department of Justice*, 772 F.2d 919, 921 (D.C. Cir. 1984); *Brown* v. *Reardon*, 770 F.2d 896, 907-08 (10th Cir. 1985); *Harden* v. *Adams*, 760 F.2d 1158, 1167 (11th Cir.), *cert. denied*, 106 S. Ct. 530 (1985). To merit reversal of an evidentiary ruling by any appellate court, LaRouche must demonstrate not only error, but also prejudice. *See, e.g., McDonough Power Equipment, Inc.* v. *Greenwood*, 464 U.S. 548, 553 (1984); *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943). This he cannot do.

witnesses to the jury, all of whom swore that this statement was false.[9] The jury simply did not believe him or his witnesses.

LaRouche also focuses on a second aspect of the First Camera broadcast: the statement by one observer that "[a]ny serious investigation by the Internal Revenue Service would lead to criminal indictments and the closing down of the LaRouche organization." (JA 65) (Pet'n at 9-10) LaRouche claims that the identity of NBC's confidential sources was crucial to his ability to prove falsity as to this statement as well. Yet, LaRouche put on no witnesses from his organizations with knowledge of their financial dealings to testify as to the supposed falsity of NBC's statement. The jury, however, heard LaRouche's own testimony on the subject. After testifying that "the statement is totally false in the form in which it was broadcast" and that "anyone who would believe that or say that is crazy, is a lunatic, is a mental case" (JA 1185), LaRouche testified as follows:

> "Q. Did you file a tax return this year?
> "A. No, I did not.
>
> "Q. What about last year?
> "A. No, Mr. Kavaler.
>
> "Q. What about the year before?
> "A. No, Mr. Kavaler.
>
> "Q. Have you filed a tax return anytime in the last ten years, Mr. LaRouche?
> "A. No, Mr. Kavaler.
>
> "Q. Who paid for the suit you're wearing, Mr. LaRouche?
> "A. I don't know, Mr. Kavaler.

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9 Three of the witnesses testified that one of them was present when Cooper was with LaRouche and that they heard no discussion similar to that reported to Lynch by Cooper. (*E.g.*, Rumpf Tr., II, 351-52, Friesecke Tr., II P.M. 29; Hellenbroich Tr., II P.M., 45) LaRouche himself explicitly denied the truth of this part of the First Camera story. (JA 1118)

"Q. You just found it in your closet, did you?

"A. No, it was a gift by persons associated with me some years ago.

"Q. Are the other suits in your closet ones that you went out to a store and bought?

"A. I have on no occasion gone out to a store and bought an article of more than a haircut, a $5 price, in the past ten years.

"Q. Do you know who pays for all those suits in your closet?

"A. I do not, Mr. Kavaler. I do not know in detail. I have some general idea that they are gifts from people associated with me or others.

"Q. I see. Who pays for your food, Mr. LaRouche?

"A. The same, Mr. Kavaler." (JA 1185-86)

LaRouche testified he does not know who pays for his large rented house in Leesburg, Virginia (shown on videotape to the jury) (JA 1187-89) or for his first class or chartered plane fares. (JA 1191-93) LaRouche did not pay for the lawyers representing him in this personal defamation suit. (JA 1193-94) In denying LaRouche's motion for judgment *n.o.v.*, the District Court found LaRouche's testimony "that he has no income and virtually no assets of his own" to be "completely lacking in credibility," and noted that the jury's punitive damage award indicated that the jurors similarly had rejected LaRouche's testimony. (JA 1603) Given such a record, there is simply no basis for concluding that the lack of identification of NBC's sources was prejudicial to LaRouche's case.

Moreover, the rulings of the courts below were correct. Every federal court of appeals that has considered the question has recognized some First Amendment protection for sources to whom a promise of confidentiality has been made.[10] At a

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10 *See, e.g., United States* v. *Burke*, 700 F.2d 70 (2d Cir.), *cert. denied*, 464 U.S. 816 (1983); *Zerilli* v. *Smith*, 656 F.2d 705, 712 (D.C. Cir. 1981); *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583

minimum, the courts have required that a party seeking disclosure of such confidential information pursue reasonable alternative sources for the information, especially in civil cases in which no Sixth Amendment rights are at stake, before using compulsory process to compel a journalist to break a promise of confidentiality.[11] LaRouche did not even begin to try to obtain this information elsewhere.[12] In fact, he concededly already possessed it. As the Court of Appeals succinctly summarized:

> "In denying LaRouche's motions, the district court grounded its decision on the fact that LaRouche had not exhausted reasonable alternative means of obtaining this same information. LaRouche did not depose Larry Cooper, the public source of the Carter assassination story. He did not exhaust all his non-party depositions before making the motion, and he failed to demonstrate to the court unsuccessful, independent attempts to gain the requested information. In fact, *New Solidarity*, a LaRouche publication, claimed that LaRouche already knew the names of all of NBC's principal sources well

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(1st Cir. 1980); *Miller* v. *Transamerican Press, Inc.*, 621 F.2d 721 (5th Cir.), *modified*, 628 F.2d 932 (5th Cir. 1980) (*per curiam*), *cert. denied*, 450 U.S. 1041 (1981); *Riley* v. *City of Chester*, 612 F.2d 708 (3d Cir. 1979); *Silkwood* v. *Kerr-McGee Corp.*, 563 F.2d 433, 436-38 (10th Cir. 1977); *United States* v. *Pretzinger*, 542 F.2d 517 (9th Cir. 1976) (*per curiam*); *Baker* v. *F & F Investment*, 470 F.2d 778 (2d Cir. 1972), *cert. denied*, 411 U.S. 966 (1973); *Bursey* v. *United States*, 466 F.2d 1059 (9th Cir. 1972); *Cervantes* v. *Time, Inc.*, 464 F.2d 986 (8th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973); *Continental Cablevision, Inc.* v. *Storer Broadcasting Co.*, 583 F. Supp. 427 (E.D. Mo. 1984); *United States* v. *Hubbard*, 493 F. Supp. 202 (D.D.C. 1979).

11 *See, e.g., Zerilli* v. *Smith*, *supra*, 656 F.2d at 714-15; *Baker* v. *F&F Investment*, *supra*, 470 F.2d at 783-84; *Democratic National Committee* v. *McCord*, 356 F. Supp. 1394, 1397-98 (D.D.C. 1973); *Mize* v. *McGraw-Hill, Inc.*, 82 F.R.D. 475, 477 (S.D. Tex. 1979); *Apicella* v. *McNeil Laboratories, Inc.*, 66 F.R.D. 78, 83, 85 (E.D.N.Y. 1975).

12 In this case, LaRouche demanded the identity of confidential sources for the First Camera broadcast *before* that broadcast had been aired or even edited. (JA 2; *see* JA 215-318)

before the two reports were broadcast." (Pet'n App. at A-8 to A-9)

In its rulings the District Court also considered the strong public policy embodied in the New York shield law[13] (JA 1436-37), *Beach* v. *Shanley*, 62 N.Y.2d 241, 255-56, 465 N.E.2d 304, 312, 476 N.Y.S.2d 765, 773 (1984) (Wachtler, J., concurring); *see Oak Beach Inn Corp.* v. *Babylon Beacon, Inc.*, 62 N.Y.2d 158, 168, 464 N.E.2d 967, 972, 476 N.Y.S.2d 269, 274 (1984), *cert. denied*, 105 S. Ct. 907 (1985), as well as a final factor that is *sui generis* to this case—LaRouche's history of harassing reporters and their sources. This factor was an appropriate one for consideration and amply supported by the record. *See NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 462-63 (1958).

When NBC produced hundreds of documents and video tapes upon LaRouche's request (JA 363), NBC first sought a protective order that limited dissemination of material designated confidential—material that contained unbroadcast information from and the identities of NBC's on-the-record sources—to LaRouche himself and his counsel. (*See* JA 3-4, 215-318; Motion of NBC for Protective Order, Dkt No. 42.) That motion, based on LaRouche's and his organizations' prior history of harassing reporters and their sources, was granted. (JA 4)[14]

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13 Ms. Lynch and Mr. Ross are based in New York out of NBC's national headquarters and are New York residents who worked on broadcasts that originated in New York.

14 The motion cited, *inter alia*, an occasion when LaRouche followers used the name of a *U.S. News & World Report* reporter to conduct interviews. This action was enjoined by the United States District Court for the District of Columbia. *U.S. News & World Report, Inc.* v. *Campaigner Publications, Inc.*, 222 U.S.P.Q. 123 (D.D.C. 1982). *See* Affidavit of Peter K. Stackhouse filed May 2, 1984, Dkt. No. 42; *see also* JA 85-86.) The motion also was based upon published reports that LaRouche campaign workers impersonated reporters and upon a LaRouche campaign teletype that documented a nationwide campaign of harassment of the Anti-Defamation League and all who report the ADL's comments on LaRouche. (Affidavit of Peter K. Stackhouse filed May 2, 1984, Dkt. No. 42)

The District Court correctly held that LaRouche had not overcome the NBC defendants' qualified First Amendment privilege. Once a court has determined that the identity of a reporter's confidential source is protected, the privilege does not become divested at trial. There is simply no legal basis for penalizing a party who *properly* asserts a privilege not to disclose confidential communications.[15]

The ruling of the District Court and its affirmance by the Court of Appeals are both well grounded in the record and legally correct. They do not provide a basis for review by this Court.

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15 *See, e.g., Wehling* v. *Columbia Broadcasting System*, 608 F.2d 1084, 1087 (5th Cir. 1979) ("we find no provision in the federal discovery rules which authorizes a court to impose sanctions on a party who resists discovery by asserting a valid claim of privilege"); 8 C. Wright & A. Miller, *Federal Practice and Procedure* § 2018, at 147 (1970) ("Rule 37 contains elaborate sanctions if a deponent fails to answer a question after being directed to do so by the court. . . . But if there is a valid claim of privilege, the court cannot order that the question be answered and that discovery be permitted") (footnote omitted).

The cases cited by LaRouche in support of his claim of prejudice differ markedly on their facts from this one. In *DeRoburt* v. *Gannett Co.*, 507 F. Supp. 880 (D. Hawaii 1981) and *Downing* v. *Monitor Publishing Co.*, 120 N.H. 383, 415 A.2d 683 (1980) (Pet'n at 13) the courts imposed a presumption that no sources existed as *punishment* for failure to obey the courts' orders to disclose sources. The District Court in this case, however, declined to enter any such order requiring disclosure. In *Dowd* v. *Calabrese*, 577 F. Supp. 238, 243-44 (D.D.C. 1983) (Pet'n at 13, 15), the court imposed sanctions based on, *inter alia*, the record's indication of a strong likelihood that the sources did not in fact exist. While *Roviaro* v. *United States*, 353 U.S. 53 (1957) (Pet'n at 13), may support the proposition that in a criminal case the government cannot assert a privilege that would impede a defendant's constitutional right to confront witnesses, it is LaRouche who is the plaintiff in this civil case. Finally, *Greenberg* v. *CBS Inc.*, 69 A.D.2d 693, 419 N.Y.S.2d 988 (2d Dep't 1979), an early case construing the New York Shield Law, effectively has been overruled by the New York Court of Appeals in *Oak Beach Inn Corp.* v. *Babylon Beacon, Inc.*, 62 N.Y.2d 158, 464 N.E.2d 967, 476 N.Y.S.2d 269 (1984), *cert. denied*, 105 S. Ct. 907 (1985).

II.

THIS COURT SHOULD NOT REVIEW THE DISTRICT COURT'S INTERPRETATION OF VIRGINIA LAW, WHICH WAS AFFIRMED BY THE FOURTH CIRCUIT

LaRouche seeks to have this Court issue a writ of certiorari to review the interpretation of Virginia law by the District Court, which was affirmed by the Court of Appeals. (Pet'n at 22-24) This attempt must fail for two reasons. First, the interpretation of state law by federal courts sitting in diversity is not a proper subject for certiorari. *See* Supreme Court Rule 17.1(a) & (c). Second, this Court traditionally gives great weight to determinations of local law by the lower federal courts more familiar with that law.[16] *See Vance* v. *Universal Amusement Co.*, 445 U.S. 308 (1980) (*per curiam*); *Bernhardt* v. *Polygraphic Co. of America, Inc.*, 350 U.S. 198, 204-05 (1956).

III.

ON THE FACTS OF THIS CASE THE DISTRICT COURT'S REFUSAL TO DECLARE A MISTRIAL, WHICH WAS AFFIRMED BY THE COURT OF APPEALS, WAS WELL WITHIN ITS DISCRETION AND IS NOT AN ISSUE SUITABLE FOR CERTIORARI

LaRouche claims that the District Court's failure to declare a mistrial or engage in further questioning of the jurors who were exposed to publicity during the trial amounted to prejudicial error requiring reversal. (Pet'n at 29)[17] The District Court,

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16 Here, Judge Cacheris, who presided at the District Court, previously had served as a state court judge in Virginia.

17 The question of prejudicial publicity generally arises in criminal cases where a defendant's life or liberty are at stake. The civil cases cited by petitioner in support of his argument involved not publicity but extensive private communications with or threats to jurors by third parties. *See Texas & New Orleans Railroad Co.* v. *Underhill*, 234 F.2d 620 (5th Cir. 1956); *Paramount Film Distributing Corp.* v. *Applebaum*, 217 F.2d 101 (5th Cir. 1954), *cert. denied*, 349 U.S. 961 (1955);

however, followed the proper procedure to the letter in its handling of the *Washington Post* article that LaRouche claims prejudiced the jury.[18]

First, in his initial instructions to the jurors, the District Court judge admonished them against reading any articles or listening to any broadcasts concerning Mr. LaRouche or the trial. (Tr., I, 51) *See e.g., United States* v. *Jackson*, 649 F.2d 967 (3d Cir.), *cert. denied*, 454 U.S. 1034 (1981); *Goins* v. *McKeen*, 605 F.2d 947, 954 (6th Cir. 1979).

Second, when an article was published in the *Washington Post*, the District Court conducted a *voir dire* of the jurors to determine whether any jurors had seen the article. When two jurors indicated they had, he questioned them individually, outside the hearing of the other jurors. *See, e.g., United States* v. *Hankish*, 502 F.2d 71, 77 (4th Cir. 1974); *United States* v. *Jackson*, 649 F.2d 967, 975-76 (3d Cir.), *cert. denied*, 454 U.S. 1034 (1981); *United States* v. *Lord*, 565 F.2d 831, 838-39 (2d Cir. 1977); *Margoles* v. *United States*, 407 F.2d 727, 735 (7th Cir.), *cert. denied*, 396 U.S. 833 (1969); *see also Marshall* v. *United States*, 360 U.S. 310, 312 (1959) (*per curiam*) ("The trial judge has a large discretion in ruling on the issue of prejudice resulting from the reading by jurors of news articles concerning the trial. . . . [E]ach case must turn on its special facts.").

Ewers' Administrator v. *National Improvement Co.*, 63 F. 562 (C.C.W.D. Va. 1894) and *Krause* v. *Rhodes*, 570 F.2d 563 (6th Cir. 1977), *cert. denied*, 435 U.S. 924 (1978), which effectively was overruled by *United States* v. *Pennell*, 737 F.2d 521, 532 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 906 (1985).

18 In the two criminal cases Mr. LaRouche relies on, the trial judge did not follow the well-established procedure that the District Court did here. *Goins* v. *McKeen*, 605 F.2d 947, 954 (6th Cir. 1979) (failure to instruct jury in advance not to read publicity about trial); *United States* v. *Herring*, 568 F.2d 1099, 1102 (5th Cir. 1978) (failure to question jury to determine extent of exposure to newspaper article or headline).

The judge also conducted a *voir dire* when the jury expressed concern over the presence of a sketch artist (from a LaRouche publication) in the courtroom. (JA 899) When one juror expressed fear that arose not from published news accounts, but solely from the testimony (JA 909-10), the judge excused her. He denied the appellant's motion for a mistrial because he found on the basis of his *voir dire*, that the jury was "very fine" and had not been "poisoned" by any external publicity. (JA 920)[19]

A mistrial is hardly automatic where there has been publicity; the decision to continue the trial rests "in the sound discretion of the district judge, and he should exhaust other possibilities before aborting a trial." *United States* v. *Hankish*, 502 F.2d 71, 77 (4th Cir. 1974). *See United States* v. *Jones*, 542 F.2d 186, 197 (4th Cir.), *cert. denied*, 426 U.S. 922 (1976) (no error in refusal to declare a mistrial when juror who expressed fear due to a headline was excused); *United States* v. *Watchmaker*, 761 F.2d 1459, 1466 (11th Cir. 1985), *cert. denied*, 106 S. Ct. 879 (1986) ("Discussions among the jurors as to their fear of the defendants are not inappropriate, so long as such discussions do not lead them to form an opinion of the defendants' guilt or innocence of the offenses charged.")

The District Court's decision to continue the trial despite LaRouche's two motions for a mistrial is consistent with all these rulings. The judge's careful questioning, coupled with his dismissal of one juror, demonstrate that he acted in an excess of caution in assuring the impartiality of the jury. The District Court did not abuse its discretion by denying LaRouche's motions for a mistrial and therefore there is no reason for this Court to exercise its supervisory power.

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19 LaRouche contends that another member of the jury—Juror Fewel—also expressed fear, but was not excused on that basis. Juror Fewel, however, merely testified that she "didn't like the idea of [the artist] being able to draw, you know, sitting and looking right at us." (JA 908-09) Juror Fewel was an alternate juror who ultimately did not participate in the jury's deliberations. (Tr., IX, 1825-26)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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